Supreme Court, U. S.
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No. 95-169

In The

Supreme Court of the United States

October Term, 1995

MARK A. METZGER,

Petitioner,

vs.

JUDY SEBEK, EARLE LILLY, PIROT & LILLY, P.C., DEPELCHIN CHILDREN'S CENTER, BAYLOR COLLEGE OF MEDICINE, ERNEST KENDRICK, MICHAEL D. COX, JEAN GUEZ, BARBARA TAYLOR, LUISA MARIA ACEVEDO LOHNER, ANN M. HODGES and JOEL A. NASS,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Texas

RESPONDENTS' BRIEF IN OPPOSITION

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LIST OF INTERESTED PARTIES

The petitioner is Mark A. Metzger.

The respondents are correctly identified in the caption except that Joe Nass is Joel Nass. William R. Pakalka of Fulbright & Jaworski L.L.P. is counsel of record for all respondents. William R. Pakalka, Nancy J. Locke and Joy M. Soloway are also counsel for repondents Baylor College of Medicine, Ernest Kendrick, Michel D. Cox, Luisa Maria Acevedo Lohner, and Ann M. Hodges. Jim Barker and M. Karinne McCullough of Giessel, Stone, Barker & Lyman are counsel for respondent Barbara Taylor. Earle Lilly of Piro & Lilly, P.C. is counsel for repondent Earle Lilly and Piro & Lilly, P.C. Joel Nass of Nass & Brown is counsel for respondent Joel Nass. Edward J. Hennessy and Randall D. Wilkins of Hennessy & Zito are counsel for respondent Judy Sebek. Donald M. Hudgins and Alfred C. Koenig of Hudgins, Hudgins & Warrick are counsel for respondent Jean Guez. Alan Magenheim and J. Preston Wrotenbery of Hirsch, Robinson, Sheiness & Glover P.C. are counsel for respondent DePelchin Children's Center.

Each of the respondents join in this brief in opposition.

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No. 95-169

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MARK A. METZGER,

Petitioner,

vs.

JUDY SEBEK, EARLE LILLY, PIROT & LILLY, P.C., DEPELCHIN CHILDREN'S CENTER, BAYLOR COLLEGE OF MEDICINE, ERNEST KENDRICK, MICHAEL D. COX, JEAN GUEZ, BARBARA TAYLOR, LUISA MARIA ACEVEDO LOHNER, ANN M. HODGES, and JOEL A. NASS,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Texas

RESPONDENTS' BRIEF IN OPPOSITION

Respondents request that the Court deny the petition for writ of certiorari seeking review of an opinion of the Court of Appeals of Texas For The First Supreme Judicial District. The court of appeals opinion is reported at 892 S.W.2d 20 (Tex. App.—Houston [1st Dist.] 1994, writ denied), *petition for cert. filed*, 64 U.S.L.W. 3086 (U.S. July 26, 1995) (No. 95-169). (For the

convenience of the Court, all citations to the opinion will be to the opinion attached as Appendix G to the petition.)

STATEMENT OF JURISDICTION

This Court cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. § 1257(a). Many of the questions presented for review in the petition were never presented to the Texas courts. These newly presented arguments may not properly be considered. *See* pp. 7-9 below.

STATEMENT OF THE CASE

Respondents respectfully oppose the petition for writ of certiorari, which, as the saying goes in Texas, would "confuse a riot." For the most part, the petition assails the Texas judiciary for making holdings never in fact made, on issues never in fact presented to the Texas courts.

For example, petitioner's summary of the case begins with this incensing statement:

> Does the victim of false sexual abuse charges have any remedy under the U.S. Constitution or the Civil Acts Right [sic] ? The Texas State Courts say no.

(Petition at 3). But as the court of appeals opinion reveals, the Texas state courts answered that question "Yes," provided the alleged victim has evidence to support each essential element of his claim. (Op. at 51a-52a) ("There is a constitutional right to be free of 'bad faith prosecution.' This right may be vindicated by bringing a civil rights claim.") (citations omitted).

While respondents understand petitioner's desire to capture

the Court's attention with a provocative entreaty, falsities are never appropriate. Unfortunately, petitioner's initial deception continues throughout the petition.

A. Course of Proceedings and Disposition of the Case Below.

Petitioner first filed this case in the United States District Court for the Southern District of Texas, Houston Division. He alleged that respondents conspired to make false accusations of sexual abuse so that respondent Judy Sebek—petitioner's then-wife—would obtain a favorable settlement of their divorce action. Petitioner alleged that respondents' conduct constituted malicious prosecution, as well as negligent and intentional infliction of emotional distress. Petitioner also alleged a deprivation of his civil rights under 42 U.S.C. § 1983 ("civil rights" or "section 1983") and a violation of the Racketeer Influenced and Corrupt Organizations Act, 28 U.S.C. §§ 1961 *et seq.* ("RICO").

The federal district court dismissed the case, ruling that petitioner failed to establish federal jurisdiction. "*Even taking every fact alleged by Plaintiff as true, he has no civil rights case or RICO action.*" (Emphasis added). Even if jurisdiction existed, however, the federal district court "abstain[ed] from exercising [it]" under the domestic relations doctrine. The federal district court also opined that "*if the Court were to address the merits, the [respondents'] motions for summary judgment would be granted*" as to all claims and all respondents. (Emphasis added). Tr. 41-46.[1] A copy of the dismissal order is attached as Appendix A.

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1. The transcript of the trial, known in Texas as the statement of facts, is contained in 16 volumes, which are consecutively page-numbered and which will be referenced as "SF Page." The transcript, which consists of pleadings, filings, orders, and the judgment, will be referred to as "Tr. Page."

Undaunted, petitioner refiled his suit in state court, alleging state and federal causes of action identical to those dismissed by the federal district court. Tr. 2-38, 153-177. To narrow the issues for the jury, and with petitioner's agreement, the trial court held a three-day hearing on the probable cause issue, the absence of which is an essential element of a malicious prosecution cause of action in Texas. (Op. at 52a). At the conclusion of the hearing, the trial court held—as a matter of law—that petitioner failed to raise a fact issue as to the absence of probable cause. SF 1601-02, 1613. Based upon this ruling, petitioner's causes of action grounded upon malicious prosecution were dismissed. *See* SF 1613-55.

After hearing petitioner's case on his other causes of action—a process that consumed more than a month—the trial court directed a verdict against petitioner on all claims. The trial court imposed monetary sanctions of $994,000 against petitioner and his counsel. Petitioner and his counsel appealed. The court of appeals carefully and responsibly reviewed the evidence as it related to each of petitioner's causes of action. (Op. at 47a-63a). After considering the evidence in the light most favorable to petitioner, and disregarding all contrary evidence and inferences, the appellate court held that the trial court did not err in directing a verdict for the respondents on all causes of action. (Op. at 63a). The court of appeals could find no evidence which raised a fact issue on a material question presented under any of petitioner's causes of action.[2] With respect to the award of sanctions, the court of appeals affirmed in part, reversed and rendered in part,

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2. As to petitioner's claim for negligent infliction of emotional distress, the court of appeals held that no such cause of action exists in Texas. (Op. at 47a). And as to petitioner's claim for medical malpractice, the court of appeals held that petitioner's cause of action failed because no duty—a necessary element of a negligence claim—was owed as a matter of law. (Op. at 47a-48a).

and reversed and remanded in part. (Op. at 78a). The Texas Supreme Court denied petitioner's application for writ of error.[3]

B. Correction of Misstatements in the Petition

The opinion of the court of appeals correctly sets forth the facts of this case. The opinion accurately depicts the gravity of the probable sexual abuse in this case and the concern and conscientiousness of persons involved in investigating the situation. In the interest of making this brief truly brief, respondents respectfully direct the Court's attention to the appellate court's opinion.

Pursuant to United States Supreme Court Rule 15.1, respondents bring the following misstatements of facts contained in the petition to the Court's attention.

Petitioner misrepresents to this Court the events that transpired in the family law judge's chambers on July 17, 1987. (Petition at 8-9). Dr. Guez never threatened petitioner or his attorney that she would recommend that all three children be put in a foster home if petitioner did not go along with the divorce settlement. Indeed, Burta Raborn, petitioner's family law attorney, recalled the conference as follows:

> [Dr. Guez] wanted to place the child in Depelchin Faith Home for constant supervision because she feared for the well-

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3. Contrary to petitioner's representation, the Texas Supreme Court never issued an opinion in this case and never affirmed the judgment of the court of appeals. Instead, the Texas Supreme Court denied petitioner's application for writ of error. A denial of a petition for writ of error is no indication that the supreme court approved the opinion of the court of appeals. *Matthews Constr. Co. v. Rosen*, 796 S.W.2d 692, 694 n.2 (Tex. 1990); Tex. R. App. P. 133(a).

> being of the child and the other children in the family.

SF 388.

Raborn further understood that if the parties did not agree to place the child in the Depelchin Faith Home, either Dr. Guez or Mrs. Senegal, a Child Protective Services case worker, "were going to move forward and do it." *Id.*

Raborn did not remember the phrase "foster home" being used during the conference. SF 389. Raborn found Dr. Guez "professional," "extraordinarily articulate," and "very persuasive." SF 427. She believed the family law judge would have accepted Dr. Guez's opinions and recommendations based upon Larry's best interests. SF 430-31. All the persons who participated in the conference testified substantially the same way as Raborn. (Op. at 31a). On July 20, the parties to the family court proceeding and their attorneys signed an **agreed** divorce decree implementing Dr. Guez's recommendations. *See* PX 1 at HC00207-222.

Petitioner states that the court of appeals concerns about Larry's behavior were unwarranted because "[Dr]. Guez testified that Larry's insertion of his finger in a sleeping child's rectum was conduct consistent with changes expected as a result of parents going through a bitter divorce." (Petition at 8). Dr. Guez testified to the very opposite: "[T]he symptom of Larry putting his finger in the rectum of a sleepy child is **not** something that I would call reflective of normal behavior for a child whose parents are going through a divorce." (emphasis added). SF 1482.

Petitioner incorrectly asserts that Dr. Guez "ruled [him] out" as Larry's abuser. (Petition at 9-10). Petitioner's assertion that he was "ruled out" is based on his misunderstanding of that term as used by the medical personnel involved in Larry's treatment. The

providers uniformly testified that "rule out" "means that those are the diagnoses so far that are yet to be considered as the actual condition of the child. . . . Not yet ruled out." SF 558, 2051-52. The court of appeals' opinion discusses the evidence with respect to the proper meaning of the phrase "rule-out." (Op. at 33a-34a).

Petitioner also misleads this Court as to the grand jury hearing. (Petition at 11). On October 27, 1987, Marie Munier, Chief of the Child Abuse Division of the Harris County District Attorney's Office, presented her summary of the case to the grand jury. SF 666-67. Munier gave the grand jury both the evidence that tended to incriminate petitioner and the evidence that tended to exculpate him. Dr. Cox's testimony, as it related to his evaluation and treatment of petitioner, was all favorable to petitioner. Dr. Cox testified that he did *not* "believe [petitioner] ever touched this child for his own sexual gratification." PX 3 at 18. Dr. Cox also testified that he had "no evidence from the standpoint of psychological tests that would [lead] me to believe [petitioner] is a sex offender." *Id.* at 17; SF 2901; *see also* Op. at 37a.

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS NO JURISDICTION TO CONSIDER MOST OF PETITIONER'S ARGUMENTS.

This Court wisely refuses to review judgments rendered by the highest court of a state unless a federal question has been both raised and decided in the state court below. *Yee v. City of Escondido*, 503 U.S. 519, 523-33 (1992) (in reviewing judgments of state courts under 28 U.S.C. § 1257, the Court will refuse to consider claims that were not raised or addressed below). *See also Beck v. Washington*, 369 U.S. 541, 549-53 (1962) (because

petitioner failed to argue equal protection in state court, question was not before this Court); *Herndon v. Georgia*, 295 U.S. 441, 443 (1935) (failure to follow appellate channels provided by state court is fatal).

Texas law is consistent with federal law: arguments not presented to the trial court cannot be presented in the court of appeals. Tex. R. App. P. 52. Likewise, grounds of error not raised by points of error or argument in the court of appeals cannot be reviewed by the Texas Supreme Court. *Peeler v. Hughes & Luce*, 38 Tex. Sup. Ct. J. 1117, 1121 (Aug. 1, 1995); *Fort Bend County Drainage Dist. v. Sbrusch*, 818 S.W.2d 392, 395 (Tex. 1991).

In this Court, for the first time, petitioner argues that he has been denied his Fifth Amendment right to be silent, and that such violation gives rise to a cause of action under section 1983. (Petition at 13). Petitioner never cited the Fifth Amendment to the court of appeals, and he cited it to the Texas Supreme Court only in relation to his now abandoned argument that he has been denied his right to counsel of his choice.[4] Moreover, petitioner's Fifth Amended Petition, the pleading on which he tried his case, contains no reference to a "right to remain silent." Tr. 153-157. In fact, petitioner's only pleaded section 1983 claim was for malicious prosecution. Tr. 160.

Separately, the trial court's and the court of appeals' decisions rest largely on "no evidence" findings. A finding of no evidence by a state trial court, which is affirmed on appeal, presents no issue deserving of this Court's attention. *See Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949), *reh'g granted*, 337 U.S. 910 (1949), *adhered to in part, reversed in part*, 339 U.S. 605 (1950) ("A court of law, such as this Court is, rather than a court for correction of errors in fact

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4. Petitioner apparently meant to cite the Sixth Amendment.

finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error.").

II.

IN ANY EVENT, THE TEXAS COURTS DID NOT COMPROMISE PETITIONER'S CONSTITUTIONAL "RIGHT TO REMAIN SILENT AND TO EXERCISE FREE AND UNCONSTRAINED WILL."

Petitioner is patently wrong when he asserts that his constitutional rights were put in jeopardy by the opinion of the court of appeals—the court of appeals never made the holdings fantasized by petitioner. First, petitioner announces there "is a conflict" between the Circuits as to whether damages may be recovered under the Civil Rights Act for violation of the right to remain silent and to exercise free and unconstrained will. (Petition at 13). That conflict is supposedly relevant to this case because of petitioner's argument that his "involuntary testimony was used to obtain an indictment." (Petition at 14).

Petitioner never testified at the grand jury hearing. Because petitioner was never asked to speak, his right to remain silent has never been abridged. Undoubtedly, this is the reason that his right to remain silent has never before been an issue in this case.

It appears petitioner is now complaining that his right to remain silent was compromised by Dr. Cox's testimony before the grand jury. That argument is equally meritless. Dr. Cox's testimony, to the extent it was based on his treatment of petitioner, was completely *favorable* to petitioner. *E.g.*, PX 3 at 18 ("I have no evidence that this man touched that child to sexually gratify himself."); *see also* Op. at 37a. The Fifth Amendment attaches only to incriminating testimony. Even

assistant district attorney Munier considered Dr. Cox's testimony to be exculpatory. SF 1000-01.

The single arguably incriminating statement Dr. Cox made to the grand jury had nothing to do with his evaluation or treatment of petitioner. Dr. Cox's statement that he accords credibility to a child's report of abuse is something Dr. Cox would have said even if he never met or treated petitioner. It is a statement based on training and experience, not on his treatment of petitioner. Thus, Cox's testimony cannot fairly be said to implicate petitioner's right to remain silent.

The facts of the present case remove it from any controversy regarding the constitutional right to remain silent. Thus, petitioner presents nothing more than a rabbit trail when he briefs the supposed disagreement between the Ninth and Eighth Circuits on whether damages may be recovered for violation of the right to remain silent.[5]

Also without merit is petitioner's claim that this case can be used to decide a purported conflict between the federal circuit courts and the Texas Supreme Court on whether the First and Fourteenth Amendments grant him the right "to choose his own physician(s), psychologist(s) and/or treatment" and whether an alleged deprivation of that right entitles him to the recovery of damages. (Petition at 17 and 22).

Fatal to that argument is petitioner's erroneous view that the Texas judiciary has decided he has no constitutional right to

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5. Nothing herein should be construed as agreement with petitioner's claim that there exists a conflict between the Eighth and Ninth Circuits. In fact, both of those courts appear to agree that there is no cause of action under section 1983 for a mere *Miranda* violation. *Compare Cooper v. Dupnik*, 963 F.2d 1220, 1243-44 (9th Cir.), *cert. denied*, 113 S.Ct. 407 (1992); *Warren v. City of Lincoln Neb.*, 864 F.2d 1436, 1442 (8th Cir.), *cert. denied*, 490 U.S. 1091 (1989).

chose his physicians. The appellate court actually held that petitioner's cause of action failed because he did not introduce any evidence that he had been deprived of these claimed legal rights. (Op. at 57a-58a). The appellate court's holding rested on the uncontroverted fact that petitioner, on the advice of his capable family law counsel, **agreed** to the terms of his divorce decree by which he consented to undergo psychological testing and treatment by a psychologist approved by respondent Guez. (Op. at 58a).

Specifically, petitioner was represented in the divorce proceeding by Burta Raborn, recognized as "one of the finest" family law attorneys. SF 424. Raborn recognized when the divorce decree was proposed that petitioner had two choices—he could agree to its terms or he could fight it out in court. Raborn recommended that he agree to the divorce decree, but she did not force him to do so. SF 404. As both petitioner and Raborn admitted, petitioner had the option of proceeding to trial on every issue in the divorce case. *Id.* He chose not to. After the decree was entered, petitioner still had choices. If he believed the decree was entered fraudulently, he could have sought a modification, SF 2302-03, or he could have filed a bill of review. He did neither.

If petitioner is alleging a due process violation (and it is difficult to discern petitioner's specific claim with respect to the Fourteenth Amendment), the claim is flawed. Petitioner does not—and cannot—allege that he did not have notice and an opportunity to be heard on the issues involved in his divorce. On the advice of his attorney, petitioner chose instead to agree to the terms of the divorce decree. Due process is amply satisfied by a court proceeding in which a party has counsel, an opportunity to put on evidence, and an opportunity to cross-examine adverse witnesses. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Certainly, petitioner may not agree to the process and then attack the outcome. *Commodity Futures Trading Com'n v. Schor*, 478

U.S. 833, 849-50 (1986); *Rathjen v. Litchfield*, 878 F.2d 836, 839-41 (5th Cir. 1989).

At its core, petitioner's purported constitutional argument is this: Because he no longer likes the terms of the agreed divorce decree, his subsequent actions consistent with the decree somehow effect a constitutional violation. His argument is without merit. Compliance with the provisions contained in a divorce decree, when the contents of the decree have been agreed to, cannot be parlayed into a constitutional claim.

Petitioner's argument that the appellate court ignored precedent in its "own backyard" with respect to an individual's right to choose his physician (Petition at 17), does not withstand even minimal scrutiny. In petitioner's key case, *Andrews v. Ballard*, 498 F. Supp. 1038 (S.D. Tex. 1980), 58 plaintiffs challenged the constitutionality of a Texas statute that made it a misdemeanor for an unlicensed physician to practice acupuncture. The federal district court agreed that the plaintiffs had a constitutional right to receive acupuncture treatment even from unlicensed persons. Neither *Ballard* nor the other cases cited by petitioner involve facts remotely relevant to this case, in which the complaining party agreed to treatment by a physician approved by another.

III.

BECAUSE RESPONDENTS DID NOT ENGAGE IN STATE ACTION, PETITIONER HAS NO SECTION 1983 OR FOURTEENTH AMENDMENT CLAIMS.

To state a cause of action under section 1983, a plaintiff must prove his rights were violated by a person acting "under color of state law." *E.g.*, *Daniel v. Ferguson*, 839 F.2d 1124, 1128 (5th Cir. 1988); *Milonas v. Williams*, 691 F.2d 931, 939 (10th Cir. 1982),

cert. denied, 460 U.S. 1069 (1983). Further, unless shown to be acting in complicity with state officials, private individuals are not "acting under color of state law" for purposes of section 1983. *See Malachowski v. City of Keene*, 787 F.2d 704, 710-11 (1st Cir.), *cert. denied*, 479 U.S. 828 (1986). Likewise, to state a claim for violation of the Fourteenth Amendment, state action is required. *Tulsa Professional Collection Servs, Inc. v. Pope*, 485 U.S. 478, 484-91 (1988).

The record contains no evidence of state action. Respondents are private individuals or private institutions; petitioner has made no showing that any respondent acted at any time as an agent, representative, or employee of the State of Texas or one of its agencies. Consequently, there can be no cause of action under section 1983 or for violation of the Fourteenth Amendment unless petitioner proved that at least one respondent acted in concert with a representative of the State. The only state officials involved in the acts petitioner contends deprived him of his civil rights were Munier (the assistant district attorney), Fisher (a paraprofessional in the district attorney's office), and Senegal (an employee of CPS), none of whom were sued. More importantly, there was no evidence of any conspiracy between these state officials and any respondent.

Munier sought an indictment because she believed there was probable cause to suspect petitioner had abused his three-year-old son. SF 1002-03. This remained true even if all information attributed to Baylor and DePelchin were excluded. SF 1001-02. Munier based her conclusion on the information in the Houston Police Department offense report, not on information provided to her independently by any respondent. SF 965. The only respondent called to testify before the grand jury was Dr. Cox. As demonstrated above, Dr. Cox's testimony was exculpatory. SF 1000-01.

Similarly, Fisher testified that petitioner's prosecution was initiated by the Houston Police Department. SF 651. None of the respondents contacted the district attorney's office to provide information or attempt to influence the decision of that office. *Id.* All contacts were initiated by the District Attorney's office. SF 650-51. With respect to Senegal, petitioner's allegations center on her presence at the July 17 pretrial conference in petitioner's divorce proceeding. Yet, Raborn testified that the conference was an "open exchange of information," that Senegal wasn't "active in the meeting," and that nobody was "running over anybody." SF 411-12.

In summary, there simply is no evidence of concerted action by or a conspiracy between any respondent and any state official. In the absence of such evidence, petitioner has no cause of action against any respondent based on section 1983 or for violation of the Fourteenth Amendment. *See, e.g., Myers v. Morris*, 810 F.2d 1437, 1454 (8th Cir.), *cert. denied*, 484 U.S. 828 (1987) (a "commonly held belief" that the plaintiff sexually abused a child does not constitute a conspiracy for purposes of section 1983); *Lee v. Town of Estes Park*, 820 F.2d 1112, 1114-16 (10th Cir. 1987) (because police officer made the decision as to whether the plaintiff was to be charged with an offense, the individual making the "citizen's arrest" could not be held liable under section 1983).

IV.

THE TEXAS COURTS NEED NO "INSTRUCTION" ON HOW TO PROPERLY APPLY RICO.

In evaluating petitioner's RICO claim, the court of appeals did not rule in a way that conflicts with a state court of last resort or in a way that conflicts with applicable RICO law.

Petitioner inexplicably states that the court of appeals

"conce[ded]" that his RICO claim was viable. (Petition at 20). In truth, the court of appeals made no such concession. (Op. at 60a-62a). Instead, to decide whether the trial court properly granted respondents' motion for directed verdict on petitioner's civil RICO claim, the court of appeals reviewed the evidence relevant to two necessary elements of a RICO claim: (1) the requirement of proof of an injury to business or property by a predicate act of racketeering activity and (2) the requirement that the RICO person must be one that either poses or has posed a continuous threat of engaging in acts of racketeering. (Op. at 60a-62a). Reviewing the same arguments that petitioner raises here, the court of appeals found there was no evidence of either element. (Op. at 60a-61a).

Specifically, as he did below, petitioner argues that "[a]mple evidence existed in the record which overwhelmingly establishes the Respondent's collective use of the mails and wires to present fraudulent claims and billings." (Petition at 21). The court of appeals rejected that argument because the allegedly false billings relied upon by petitioner were not even related to Larry's stay and did not affect him. (Op. at 61a). Because the allegedly falsified billings did not relate to petitioner's son, the court of appeals correctly found that there was no evidence that petitioner was injured in his business or property by any predicate act of racketeering activity. The mere existence of allegedly falsified billings does not give a stranger to the billings standing to bring a RICO claim. Petitioner never addresses this holding of the court of appeals opinion, electing instead to pretend the appellate court dismissed his arguments for phantom reasons.

As an independent basis for affirming the directed verdict on the RICO claim, the court of appeals held that Larry's treatment and evaluation is not actionable under RICO because evidence of treatment is not evidence that the providers "posed a continuous threat [to engag[e] in acts of racketeering." (Op. at 61a). Petitioner does not challenge that holding.

V.

INDEPENDENTLY, PETITIONER'S CIVIL RIGHTS AND RICO CLAIMS ARE BARRED BY *RES JUDICATA.*

When the trial court directed a verdict against petitioner on his section 1983 claims, it was the second court to conclude that petitioner failed to state or support a viable section 1983 claim or RICO claim. The first court to do so was the federal district court, which dismissed petitioner's lawsuit finding that "[e]ven taking every fact alleged by Plaintiff as true, he has no civil rights case or RICO action." Tr. 41-45. *See* Appendix A. The federal district court's order did not state that the dismissal of these claims was without prejudice, and petitioner did not appeal the dismissal order. Under these circumstances, the dismissal is an adjudication on the merits of petitioner's "civil rights" claims and constitutes *res judicata* as to those claims. *See Cannon v. Loyola Univ.*, 784 F.2d 777 (7th Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987); *Carter v. Money Tree Co.*, 532 F.2d 113 (8th Cir.), *cert. denied*, 426 U.S. 925 (1976); *Hall v. Tower Land & Inv. Co.*, 512 F.2d 481 (5th Cir. 1975).

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION ENTERED AUGUST 17, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-89-2346

MARK DOE,

Plaintiff

vs.

JUDY DOE, et al.,

Defendants.

ORDER

Plaintiff has brought suit against his former wife, her attorney and various agencies and individuals who were involved in a domestic relations action, directly or indirectly, in which Defendant, Judy Doe, was named managing conservator of the three children of the parties. The Does separated in about September of 1986, and Mark Doe brought action the next month seeking managing conservatorship of the three children as well as a divorce.

Plaintiff now claims that he was extorted into an unfair property settlement, lost the conservatorship issue in the domestic relations court and was maliciously prosecuted for

child abuse all as a result of a conspiracy among all the Defendants. He bases his claim of federal jurisdiction on 28 § 1983 and the RICO Act. He asserts pendent state claims for malicious prosecution, invasion of privacy, intentional infliction of emotional distress and civil conspiracy. He seeks damages well into the tens of millions of dollars, but apparently does not want to relitigate the property settlement.

Plaintiff has voluntarily dismissed three of the original Defendants: Harris County Childrens' Protective Service, Harris County and Karen Singleton. There are now pending motions to dismiss or, alternatively, motions for summary judgment on behalf of the Defendants, responses by Plaintiff and a motion by Plaintiff to amend and supplement his complaint.

There are nearly 150 entries now on the docket of this case. Despite the awesome profusion of voluminous paper work in this file, the dispute among the parties can be stated in outline form even at the risk of over-simplification. Mark and Judy were involved in a bitter divorce action which contained the elements of tragedy. He accused her of being involved in an adulterous relationship and sought to take the children away from her. She accused him of child abuse based on her assertions that their two year old son told her "daddy did it" and some teachers believed the the boy showed signs of sexual abuse. Her lawyer used the threat of pressing the abuse allegations to induce Mark to enter into an unfavorable settlement of the property question and to give Judy managing conservatorship.

After the divorce confrontation, Mark was charged criminally with child abuse, but the charge was dismissed when the District Attorney decided that the child was not a competent witness.

Appendix A

In order to have time to address the questions of abstention, jurisdiction and whether Plaintiff has stated a claim, the Court ordered a halt in depositions on oral questions until the questions of law could be determined. Defendants have submitted affidavits to support their motions, and Plaintiff has done the same. Plaintiff also pleads that he needs additional discovery before he will be able to answer motions for summary judgment fully.

While the finder of fact would certainly be interested in deposition testimony in which any Defendant admitted entering into a conspiracy with the other Defendants to violate Plaintiff's civil rights or admitted joining an enterprise to injure Plaintiff's property or business, it is not likely that such discovery will ever be available. Having had the "benefit" of the pleadings, proposed third amended complaint, motions, affidavits and briefs, the Court feels sufficiently educated on the facts and the law to make its ruling on the law before this unfortunate matter goes further.

While the Court could take the time and make the effort to list each of Plaintiff's claims against each of the Defendants and grant summary judgment to all Defendants, the Court believes that the law is clear that such effort is not proper. The Court must say, however, that the arguments of each Defendant are well supported in law and that, if the Court were to address the merits, the motions for summary judgment would be granted.

While the Plaintiff makes a strong argument that he has been abused by his ex-wife and her attorney, and that some of the other defendants have not acted as professionally as one would desire, he has convinced the Court that those arguments are being made in the wrong court. To make it simple: the Plaintiff does not belong in a federal court with this fact situation.

Appendix A

Even taking every fact alleged by Plaintiff as true, he has no civil rights case or RICO action. What he is attempting to do is convert his custody battle into a claim for damages flying in the face of the long-standing rule that federal courts should stay out of that area of domestic relations dispute resolution reserved to the states. *Rogers v. Janzen,* 891 F.2d 95 (5th Cir. 1989). Plaintiff has every right, at this very moment, to bring an action in State court to reopen the question of the managing conservatorship of his children and to give that court the evidence of how he was coerced or extorted into the prior decree. He also has the right to bring his action in State court for malicious prosecution, intentional infliction of emotional distress or any other tort his attorney can imagine.

What Plaintiff does not have the right to do is ask a federal court to decide whether he abused his young son sexually or at least whether his ex-wife, the social workers, the physicians and other Defendants THOUGHT he had abused his child sexually.

Even though Plaintiff's attorney in *Rogers,* above, was not as inventive as Plaintiff's attorney in the instant case, the *Rogers* case fact situation is remarkably similar to the facts in the instant case. Both cases have plaintiffs seeking damages from former spouses for conduct arising out of domestic relations disputes. As in *Rogers,* the facts in the instant case do not fall squarely within the traditional domestic relations exception. The instant facts do fall within the concept that, in order to give Mark Doe the relief requested, this Court would have to revisit the factual determination made in the domestic relations court. If Mark Doe were to prevail in this Court, that result would be incompatible with the domestic relations court result.

The attempt to assert federal jurisdiction by Plaintiff Mark

Appendix A

Doe must fail, and the Court abstains from exercising jurisdiction even if, arguably, that jurisdiction exists.

This case is DISMISSED. Each party will pay that party's own costs.

Signed this 16th day of Aug., 1990 at Houston, Texas.

s/ Norman W. Black
NORMAN W. BLACK
UNITED STATES DISTRICT JUDGE

TRUE COPY I CERTIFY
ATTEST: 9-13-91
JESSE E. CLARK, Clerk
By s/ S. Murdock
Deputy Clerk